

1 The Government has moved for an order limiting or excluding entirely any
2 presentation of evidence by the defense on the issue of entrapment. The
3 Government argues that because the Confidential Informant did not become a
4 government agent until sometime in February 2010, and there is evidence that Mr.
5 Kurt may have been in possession of firearms or may have intended to possess
6 firearms prior to that date, the defense cannot prove entrapment as a matter of law.
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10 ARGUMENT:

11 A Defense of entrapment is established by evidence that the defendant was
12 induced by a government agent to commit the crime and was not otherwise pre-
13 disposed to commit the crime. *United States v. Smith*, 924 V.2d 889, 898 (9th Cir.
14 1991). To be entitled to jury instruction on entrapment, a defendant need present
15 only enough evidence to create a question of fact as to each of the two elements.
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17 *United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir. 1993), *citing United States v.*
18 *Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989). The evidence of entrapment
19 may be weak, inconsistent, insufficient, and of doubtful credibility. Nevertheless,
20 the defendant is entitled to the instruction unless the government is able to rebut
21 the evidence to the extent that no rational juror could entertain a reasonable doubt
22 as to either element. *Id.*, *citing United States v. Hoyt*, 879 F.2d 505, 509, *amended*
23 *on other grounds*, 888 F.2d 1257 (9th Cir. 1989); *see also, United States v. Becerra*,
24 992 F.2d 960, 963 (9th Cir. 1993).
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1 Here, the Government asks this Court to exclude Mr. Kurt's evidence of
2 entrapment as being insufficient to require the giving of a jury instruction without
3 the Court having the benefit of actually hearing the evidence. The evidence in
4 support of Mr. Kurt's entrapment defense will come from Mr. Kurt, from other
5 defense witnesses, and from the Confidential Informant.
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8 The defense believes that the evidence will establish that Mr. Kurt was not
9 pre-disposed to commit the offense for which he is charged by showing that he was
10 presented with other opportunities to commit the offense but did not do so prior to
11 being enticed to commit the offense by the Confidential Informant.
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14 The defense believes that the evidence will also show that the government
15 took advantage of Mr. Kurt's desire to remain in contact with the Confidential
16 Informant, a known associate of several members of a violent racist group who had
17 committed multiple assaults on targeted individuals, for his own protection and in
18 order to protect others, and that the Confidential Informant encouraged Mr. Kurt to
19 commit an offense that he would not otherwise have committed.
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22 Whether the defense is ultimately able to produce evidence sufficient to
23 require the giving of an entrapment instruction and whether the government is able
24 to rebut any such evidence to the extent that no reasonable juror would entertain
25 any doubt as to either element of the entrapment defense is a matter that can be
26 determined only after the Court has actually heard the evidence at trial. The
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1 Government cites no authority for the proposition that a court can either limit or
2 exclude evidence of entrapment simply because, in the Government's view, such
3 evidence ultimately will be insufficient to establish the defense. The Government
4 request that this court preclude in a pre-emptive manner any attempt by Mr. Kurt to
5 establish an entrapment defense at trial without actually hearing the evidence is not
6 supported by any legal authority and should be denied.
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11 Dated this 2nd day of September, 2011.
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Earl Hicks and Stephanie Van Marter, Assistant United States Attorneys.

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